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IN THE

Supreme Court of the United States

October Term 1967
No. 413

GORDON A. ROGERS,

Petitioner,

vs.

ROBERT J. ZINGHEIM,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California.

EDWARD R. MINOR,
JAMES M. FIZZOLIO,
12160 Victory Boulevard,
N. Hollywood, Calif. 91606,
Counsel for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

	Page
Jurisdiction	1
Citations to Opinions Below	2
Statement of Facts	2
Question Presented	6
Reasons for Granting the Writ	6
I.	
Conflict of Laws	6
II.	
Res Judicata	9
III.	
Due Process	10
IV.	
Comity	11
Conclusion	11

INDEX TO APPENDICES

Appendix A. Order Denying Hearing After Judgment by the Court of Appeal	1
Appendix B. Opinion of the Court of Appeal	2
Appendix C. Portions of Court's Oral Decision	20
Appendix D. Agreement for Sale of Radio Station and Agency	23

TABLE OF AUTHORITIES CITED

Cases	Page
Aetna Life Insurance Co. v. Druiken, 266 U.S. 389	10
Drummond v. United States, 324 U.S. 316	8
Frankel v. Johns-Mansville Corp., 257 F. 2d 508	6
Holmes Insurance Co. v. Dick, 281 U.S. 397	10
Kippel Estate, In re, 7 Wis. 2d 335	6
Life & Fire Ins. of N.Y. v. Adams, 34 U.S. 571	7
Litchfield v. Crane, 123 U.S. 549	8
New York Life Insurance Co. v. Dodge, 246 U.S. 357	10
Signal Oil & Gas Co. v. Ashland Oil & Refining Co., 314 P. 2d 62, mod. 332 P. 2d 1	7
Vanston Committee v. Green, et al., 329 U.S. 156	6
Rules	
Rules of the Supreme Court of the United States, Rule 19	2
Statutes	
General Communications Laws of Mexico, Chapter 6, Article 43	8
United States Constitution, 14th Amendment	10
United States Constitution, 14th Amendment, Sec. 1	2
Textbooks	
6A, Corbin on Contracts, p. 750	11
Goodrich, Conflict of Laws, 4th Ed. (1964), pp. 204-205	6, 7
46 Iowa Review (1961), 713	6

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Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California.

Jurisdiction.

This is a petition of Gordon A. Rogers for Writ of Certiorari to review a judgment of The District Court of Appeal, Fourth Appellate District, State of California, Division One, entered on March 27, 1967, affirming that portion of the judgment made and entered by The Superior Court of the State of California in and for the County of San Diego, on June 10, 1965, awarding the amount of $29,689.04 in money damages against petitioner Rogers. The Supreme Court of the State of California denied a hearing to petitioner on May 24, 1967.

Jurisdiction of this Court is involved under U.S.C.A., Const. Amend. 14, Section 1, and Sup. Ct. Rule 19, 28 U.S.C.A.

Citations to Opinions Below.

Supreme Court of California. Order filed May 24, 1967 denying petition for hearing set forth in Appendix A. No opinion.

Court of Appeal. Opinion filed and judgment entered on March 27, 1967 set forth in Appendix B. Reported 57 Cal. Rptr. 809.

Superior Court. Unreported oral opinion set forth in Appendix C. Judgment filed and entered on June 10, 1965, #275082.

Statement of Facts.

Station XEMO was a commercial radio broadcasting station in Tijuana, Mexico. The station was licensed under Mexican law to one Ferreira, now deceased, a Mexican national. Respondent Zingheim, a United States citizen, living in San Diego, entered into an "arrangement" with Ferreira whereby the latter "sold" Station XEMO to the former. However, Ferreira retained all indicia of ownership, including the license.

Under Mexican law, only a Mexican national of native birth or a Mexican corporation whose shares have been issued only to Mexican nationals, may hold such a license.

On November 24, 1958, respondent agreed under written contract with one Marshall to sell him Station XEMO, together with agency rights in San Diego and sundry equipment. Petitioner Rogers guaranteed the contract. Marshall and petitioner are United States citizens, not Mexican nationals. Ferreira executed an endorsement to this contract whereby he undertook to be bound by its terms.

The contract provided that Radio Station XEMO was to be transferred to such person of Mexican nationality or such Mexican corporation, as Marshall shall designate.

The contract provided further that the Superior Court of the State of California would be the sole and exclusive forum for the trial of any issues but that "if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect". (See Appendix D).

On April 1, 1960, a fire destroyed the buildings housing Station XEMO. After November 1960, Marshall made no payments under his contract of Novembr 24, 1958 with respondent.

On January 27, 1960, respondent filed suit (#240878) in the Superior Court in San Diego, California, against Marshall *only* to recover delinquent payments under the contract. Marshall cross-complained alleging illegality of the contract under the applicable Mexican law, which issue was entertained, but rejected by the Court without comment in a memorandum opin-

ion. Judgment was entered against Marshall on January 12, 1962 in the sum of $3,600.00, and costs.

Following award of the foregoing judgment to respondent, he filed an action for money damages against petitioner only in the Municipal Court, San Diego, California, for the sum of $3,600.00, which represented the delinquent payments on the contract. Petitioner was not a signatory to the instrument, but he had guaranteed payment thereon. This case was subsequently transferred to the Superior Court in San Diego prior to trial where judgment was awarded for petitioner, in the amount of $3,600.00 (#275082).

Respondent also filed in the Superior Court in San Diego an action (#262878) against petitioner and Marshall for money damages in the amount of $40,000.00, representing the unpaid balance of the purchase price under the contract. After trial, the court rendered judgment against petitioner and Marshall in the sum of $29,689.14 for the unpaid balance of the purchase price and the sum of $9,896.00 in attorneys' fees. The California Court of Appeals affirmed the judgment, except as to the amount of the attorneys' fees awarded, which were substantially reduced.

These cases were consolidated #262878 and #275082 for trial in the Superior Court. At the outset of the trial, the court ruled that the issue of the contract's illegality was foreclosed by prior adjudication in the Superior Court case against Marshall (#240878). Again, before the commencement of trial, defendants

offered to introduce evidence that the contract in issue was illegal under Mexican law and should therefore be held void in the present action. The court, however, sustained plaintiff's objection to this offer of proof by defendants under the doctrine of *res judicata.*

Petitioner thereupon duly filed a petition for hearing with the California Supreme Court. This petition was denied on April 24, 1967.

Petitioner Rogers now files this Writ of Certiorari on the question of whether the ruling of the Superior Court in the case against Marshall (#240878), in which petitioner was not named as a defendant or party, could properly dispose of the question of the contract's validity in the subsequent cases (#275082 and #262878), as held by the California District Court of Appeal.

Question Presented.

Does denial of due process exist where litigant is barred by Appellate Court from raising defense of invalid foreign contract under the doctrine of *res judicata* applied by Trial Court to proceedings in a court where the litigant was not a party?

REASONS FOR GRANTING THE WRIT.

I.

Conflict of Laws.

One of the basic rules in the field of conflicts of law that the laws of the State most substantially connected with the contract and transaction will generally govern.

In determining the applicable law, courts will consider which state's or foreign country's total relationship with the transaction is most significant. Factors to be considered in this connection include the location of the subject matter of the contract, the location of the place of business and incorporation, and place of negotiating, contracting and performance.

Vanston Committee v. Green, et al., 329 U.S. 156, 162 (1946);

Frankel v. Johns-Mansville Corp., 257 F. 2d 508 (1958);

In re Kippel's Estate, 7 Wis. 2d 335 (1959);

Goodrich, Conflict of Laws, 4th Ed. (1964), pp. 204-205;

Weintraub, Contracts and the Conflict of Laws, 46 Iowa Review 713 (1961).

Radio station XEMO, the principal property subject to the contract, is located in Tijuana, Mexico, and the licensee and owner of the station was a resident and citizen of Mexico. Substantial performance of the contract would necessarily occur in Mexico from where the aforesaid station would broadcast, and where its properties are located. Such facts seem to compel the conclusion that Mexico, rather than California, is more closely connected with the present contract and transac-

tion, and that Mexico clearly has a predominant interest therein.

Added to the weight of the foregoing circumstances is the provision in the contract requiring application of Mexican law. It is provided that the Superior Court of California is the sole and exclusive forum for trial of any issues arising under the contract; however, it is further provided that, if any part of the contract is contrary to the laws of Mexico, such part becomes void and of no effect. (See Appendix D, p. 26).

Where the parties concede applicability of the invalidating foreign law, such law will generally govern the contract. *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.*, 314 P. 2d 62, modified on other grounds 332 P. 2d 1 (1958).

The frequently followed "Renvoi doctrine", which refers to the law of another state in a contract, is to select the law applicable to the contract for its solution is primarily to achieve a result which is not dictated by the fortuitous choice of forum. *Goodrich, supra,* Note 36; *Life & Fire Ins. of N.Y. v. Adams,* 34 U.S. 571 (1835). Based upon the complete record of this case it seems not unreasonable to believe that respondent was attempting to achieve results in the California courts not available to him in Mexican Courts because of the illegal character of the contract.

That Mexican law clearly prohibits transfer or issuance of licenses for commercial radio stations to individuals who are not Mexican by birth or to non-Mexican companies is undisputed by the parties to this controversy herein. The opinion of the California Court of Appeals indicates that both the appellate and

trial court took judicial notice that the contract in question was contrary to Mexican law. See also, *General Communications Laws of Mexico,* Chapter 6, Article 43, which provides as follows:

> "Licenses for commercial radio stations may solely be issued to persons who are Mexican citizens by birth or to Mexican companies * * *. Once a license is issued, the partial or total assignment or alienation of the same license or of shares of participants as associates of the licensed company to a foreign subject shall be ground for forfeiture, aside from the grounds enumerated in this law * * *".

Ferreira, the licensee and owner of Station XEMO, located in Mexico, was the only Mexican national related to the transaction to which the station was subject. No contention has been made at any point in the proceedings below that petitioner, respondent or Marshall was a Mexican national. That Ferreira expressly agreed to be bound by a contract void under Mexican law did not thereby validate it. If Ferreira had transferred the license, as provided in the agreement, to a Mexican nominee of Rogers, it is still doubtful that this would have legalized the contract; however, the fact remains that no such transfer was executed.

II.
Res Judicata.

Petitioner Rogers was not a party or named as a defendant in the Superior Court trial #240870 brought by respondent against Marshall only. In that action the Court summarily ejected as being without merit Marshall's assertion that the contract of January 24, 1958 was illegal. The Court submitted no grounds, or gave any comments or explanation in support of its position.

It was error on the part of the Court of Appeal to sustain the Superior Courts refusal to entertain in the two subsequent, consolidated cases (#275082 and #262875), petitioner's offer of proof made before and at trial, as to the illegality of the contract. Applying the doctrine of *res judicata,* the Superior Court held that the respondent in the earlier case, also in the Superior Court (#240878), had secured an adjudication that the contract of January 24, 1958 was legal, and that the petitioner was foreclosed from raising this issue, even though he was not a party to the earlier proceeding.

This court has held that a non-party who was not named in the prior adjudication is not bound thereby, even though an interest existed in securing a favorable decision on the questions involved and even though the non-party contributed to the expenses of the prior litigation. *Litchfield v. Crane,* 123 U.S. 549. It has also been held by this court that a non-party who supplies counsel to the prior litigant is not bound when not formally a party unless the evidence shows that he had "the laboring oar" in a prior suit. *Drummond v. United States,* 324 U.S. 316, 318.

III.

Due Process.

It has been held that a State violates the Due Process clause of the 14th Amendment if it applies its laws to circumstances over which it has no legislative jurisdiction. *Holmes Insurance Co. v. Dick,* 281 U.S. 397 (1930). It is immaterial that the Federal question was not raised in the state trial court, where such question was passed on by the state appellate courts, *Holmes v. Dick, supra.*

In this Writ it appears that the Petitioner, based upon the above authority, was deprived of procedural due process. Neither at the trial level, nor at the state appellate level was he permitted to offer proof of the illegality under Mexican law of the contract of January 24, 1958. Based also upon the *Holmes, supra,* failure to take an appeal from the trial court ruling (Case #240878) where Petitioner was a Guarantor under the contract in issue would not foreclose him from his subsequent appeal on the Federal question to the California District of the Court of Appeal or to the California Supreme Court. In being prevented, therefore, to place the issue of the illegality of the January 24 contract before the California courts, Petitioner was precluded from securing a ruling on the merits.

For further rulings by this Court pertaining to deprivation of property without due cause see *Aetna Life Insurance Co. v. Druiken,* 266 U.S. 389 (1924), *New York Life Insurance Co. v. Dodge,* 246 U.S. 357 (1918).

IV.

Comity.

Where a contract violates the law of a friendly nation such as Mexico, if is contended that decisions enforcing such contracts be stricken down on grounds of comity. Such contracts should not be given the stamp of approval by a California court and thereby flout Mexico's primary concern in the subject matter. California courts should deny relief for reasons of comity where it seems clear that a contract was made to circumvent Mexico law.

Corbin on Contracts, Vol. 6A, Illegal Bargains, at page 750, states:

> "It may be noted, however, that on grounds of comity and national welfare a bargain is now held to be illegal if it is made for a purpose that is in violation of the law of another state or friendly nation."

Conclusion.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

FIZZOLIO & FIZZOLIO,

By EDWARD R. MINOR,

Counsel for Petitioners.

APPENDIX A

Order Denying Hearing After Judgment by the Court of Appeal.

In the Supreme Court of the State of California, in Bank.

4th District, Division 1, Civil No. 8151, 8152.

Zingheim v. Marshall et al.

Zingheim v. Rogers.

Appellants' petition for hearing DENIED.

Filed May 24, 1967.

Traynor, *Chief Justice*

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Robert J. Zingheim, Plaintiff and Respondent, v. Robert S. Marshall and Gordon A. Rogers, Defendants and Appellants. 4 Civil No. 8151.

Robert J. Zingheim, Plaintiff and Respondent, v. Gordon A. Rogers, Defendant and Appellant. 4 Civil No. 8152.

Filed Mar. 27, 1967.

Appeals from two judgments of the Superior Court of San Diego County. William P. Mahedy, Judge. Affirmed in part and reversed in part, with directions.

Fizzolio & Fizzolio and Edward L. Lascher for Defendants and Appellants.

Kimball, Jones & Kelly for Plaintiff and Respondent.

Appeals have been taken in two actions consolidated for trial; separate judgments were given based upon separate findings of fact. In both actions plaintiff recovered judgment: in action #275082 against Gordon A. Rogers (Rogers), and in action #262878 against Robert S. Marshall (Marshall) and Rogers. Both defendants have appealed.

FACTS IN SUPPORT OF JUDGMENTS

Prior to November 24, 1958, plaintiff operated commercial radio broadcasting station XEMO in Tijuana, Mexico. The station was licensed under Mexican law to one Fernando Ferreira (Ferreira), a Mexican national. Under Mexican law, only a Mexican national

of native birth or a Mexican corporation whose shares have been issued only to Mexican nationals may hold such a license.

At the same time plaintiff operated an agency with a San Diego office for the sale of advertising time on XEMO.

On October 20, 1958, plaintiff gave a 30-day option to Rogers and four other persons not party to the present litigation to purchase the agency and the physical equipment of XEMO.

Before the expiration of the option period, Rogers communicated with plaintiff not for the purpose of exercising the option but to arrange to purchase the agency and XEMO for himself.

A written agreement was prepared by plaintiff's attorney by which plaintiff agreed to sell the agency, all accounts receivable and XEMO to Marshall, who was acting for Rogers, who did not wish his name to appear in the agreement. Originally the agreement was dated November 20, but that date was changed to November 24, on which date it was signed. Rogers said he did not wish the date of November 20, because it was too close to the option expiration date.

The agreement contained the following provisions:

> "Radio Station XEMO in Tijuana, Baja California, Republic of Mexico, is presently in the name of Fernando Federico Ferreira, and shall be transferred to such person of Mexican nationality or such Mexican Corporation as Robert S. Marshall shall designate.
>
> ". . .

"The parties agree that the Superior Court of the State of California shall be the sole and exclusive forum for the trial of any issues or matters or causes of action which may arise to any party hereto because of this contract. However, if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect, but the balance of this contract is to remain in full force and effect."

Following the signatures of plaintiff and Marshall was the written guaranty of Rogers to pay the purchase price of $40,000 in the manner provided.

On a separate sheet was an agreement signed by Ferreira which reads as follows:

"FOR VALUE RECEIVED, I hereby agree to be bound by the terms of the contract dated November 24, 1958, between Robert J. Zingheim and Robert S. Marshall, and further agree to transfer the license for Radio Station XEMO in Tijuana; Baja California, Republic of Mexico to such person of Mexican nationality or such Mexican Corporation as Robert S. Marshall shall designate."

All the persons named were present at the time of signing. Everyone knew that Rogers was the real party in interest in the purchase. Rogers had been informed by plaintiff and knew from other sources that Mexican law required that the licensee be a Mexican national or a Mexican corporation.

Subsequently Rogers went with Ferreira to Mexico City to have a Mexican corporation formed to which the license might be transferred; there Rogers was advised to have the corporation formed in Tijuana to avoid

the necessity of holding the meetings in Mexico City. Rogers and Ferreira returned without having had the license transferred. Thereafter Rogers did not designate to Ferreira, during the latter's lifetime, anyone to whom Rogers wished the license to be transferred.

In 1959, a California corporation had been formed, known as Radio 860, Inc., to which the agency, accounts receivable and physical assets of XEMO were transferred.

The buildings housing XEMO were destroyed by fire on April 1, 1960. Previously Rogers had purchased land in Mexico for re-locating the station, which land he placed in the name of Ferreira.

Following the fire of April 1, 1960, XEMO went off the air about February 1961. It resumed operation at the new location on September 2, 1961. It was necessary that it resume operation to keep the license alive. With the exception of one transmitter purchased by Rogers, practically the entire cost of the new building and equipment was borne by Ferreira with borrowed money. Rogers refused the opportunity of taking over the operation upon the condition of paying those costs.

Ferreira died March 23, 1964.

On June 30, 1964, Rogers' attorney made demand on Ferreira's attorney that the license be transferred to a certain nominee.

Rogers never demanded of plaintiff that the license be transferred.

Rogers made his last payment to plaintiff on account of the purchase price on November 17, 1960.

The contract of November 24, 1958 provided that the purchase price of $40,000 be paid in monthly installments of not less than $300 with a provision for a larger payment when net billings for advertising sold in the previous month exceeded a certain amount. There was a provision for acceleration in the event of default.

Before an actual delinquency occurred, plaintiff filed action #240878 in the superior court for the entire balance, upon the theory that monthly payments of more than $300 should have been but were not made. Marshall was the only named defendant.

Marshall answered and cross-complained through counsel furnished by Rogers. The cross-complaint sought rescission and recovery of the amounts paid based upon claims of fraud and misrepresentation and of the illegality of the contract. There were other counts seeking damages.

Rogers testified as a witness in defense of the action and in support of the cross-complaint.

The trial court, in findings dated December 9, 1961, found that there had not been a default before the action commenced; because 12 payments had become due up to the date of the judgment, judgment was given for those amounts totaling $3,600; plaintiff was denied any attorney's fees under the contract; the allegations of the cross-complaint as to fraud and illegality were found to be untrue. The following conclusions also were made:

> "IV That no default can be declared for purposes of declaring the balance of the remaining payments due immediately where the default occurs

during the process of litigation to determine whether such a default existed. The right of action must exist at the time that action is commenced.

"V That nothing in this judgment hould be construed as an adjudication of the duty of the plaintiff to bring about a transfer of the license and radio station in Mexico from Fernando Federico Ferriera [sic] to the defendant, and that the findings in this action are without prejudice to the determination in a future action as to that duty."

Judgment was entered accordingly against Marshall. No part of that judgment had been paid up to the time of trial of the present action.

THE PRESENT ACTIONS

The present actions were filed in March 1962. Action #262878 was commenced against Marshall and Rogers to recover the unpaid balance of the purchase price. The complaint alleged that the November 24, 1958 contract was entered into by Rogers through Marshall as his agent; it alleged the filing of action #240878 and the findings therein with regard to the legality of the contract and the judgment rendered.

Action #275082 was commenced in the municipal court against Rogers, seeking to recover the amount of the judgment that had been rendered in action #240878 against Marshall, based upon Rogers' agreement to guarantee the payments by Marshall. Rogers cross-complained for a sum in excess of $50,000 and the case was transferred to the superior court.

It was stipulated that defendant Rogers supplied the counsel in action #240878 and had a proprietary in-

terest in the outcome, and that on the date of execution of the November 24 agreement Marshall was acting as the agent of Rogers. Based upon this stipulation, the court held that the findings of fact, conclusions of law and judgment in action #240878 were *res judicata* as to defendants in the cases at bench and that evidence intended to show the illegality of the November 24 contract was, therefore, inadmissible.

The court issued findings stating that: Rogers, for valuable consideration, contracted to guarantee the payments by Marshall; Rogers had actual notice of action #240878 and was worn as a witness therein; Rogers supplied counsel in action #240878 to Marshall and controlled the litigation thereof; in the November 24 contract, Marshall agreed to transfer the license; plaintiff, under that contract, was not obligated to obtain a transfer of the license; plaintiff has performed all the covenants under the agreement; there has been no failure of consideration or occurrence of conditions affecting the obligation; Rogers' performance was not conditioned on the procurement of transfer of the license by plaintiff; and Rogers' guaranty was given for a valuable consideration. Based upon these findings, the court concluded that Marshall was acting within the scope of his employment when he executed the contract; further, that Rogers is bound by the findings of fact, conclusions of law and judgment in action #240878.

The court entered judgment in the amount of $3,600 against Rogers, and a judgment in the amount of $29,689.04, for the unpaid balance of the purchase price, against Rogers and Marshall and attorney's fees under the provision of the contract relating to fees in an amount of $9,896.

DEFENDANTS' CONTENTIONS

The contentions made by defendants, set forth at some length under several headings and sub-headings, may be summarized as follows:

Plaintiff, having pursued action 240878 to judgment, exhausted his remedies; his attempt to recover on the same contract in the present action is an attempt to split his cause of action.

The findings and judgment in action #240878 are not binding upon Rogers, who was not a party to that action; his interest in the subject matter and outcome of the action and participation in the defense do not permit the findings and judgment to be *res judicata* as to him; he may, therefore, assert the illegality of the November 24 contract under Mexican law and his other defenses; and Marshall also may assert the illegality of the contract.

The contract was not only illegal but void; that it was conditional upon a transfer to the nominee of Marshall of the license issued by the Mexican Government; that it was plaintiff's obligation under the contract to obtain the transfer of the license by Ferreira to Marshall's nominee; and plaintiff's failure to effect such transfer, constituted a failure of consideration.

A judgment against both Rogers, the principal, and Marshall, his agent, was error; that a judgment against only one would have been proper; that since plaintiff had pursued action #240878 to judgment against Marshall alone, plaintiff thereby elected to hold Marshall as the responsible party and could not, therefore, hold Rogers.

That the award of attorney's fees as to the amount was arbitrary and excessive.

WAS THERE A SPLITTING OF PLAINTIFF'S CAUSE OF ACTION?

No.

DID THE CONTRACT MERGE INTO THE JUDGMENT IN ACTION #240878?

No.

WAS THE OBTAINING OF THE JUDGMENT IN ACTION #240878 A BAR TO THE PRESENT ACTION ON THE NOVEMBER 24 CONTRACT?

No.

Section 1047, Code of Civil Procedure, provides:

> "Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom."

It was conclusively adjudicated in the former action, #240878, that there was no delinquency under the contract at the time that action was commenced that permitted plaintiff to declare the entire unpaid balance due; and that plaintiff might recover only the accrued monthly payments; that he had no right to declare the entire unpaid balance due because of non-payment during the pendency of the action of installments that became due in that period. No appeal was taken from that judgment.

No cause of action for subsequently accruing payments arose prior to judgment in that action, #240878. Recovery of such installments cannot be barred by the judgment in that action. (*Reuter v. Pacific Mut. Life Ins. Co.*, 5 Cal. App. 2d 333, 336-337.)

WERE THE FINDINGS AND JUDGMENT IN ACTION #240878 BINDING UPON ROGERS?

Yes. It is unquestioned that in executing the contract Marshall acted for a disclosed principal, Rogers, who from that time on claimed to be owner of the radio station; that Rogers knew of the commencement of the action, furnished counsel to defend it, appeared as a witness at the trial of the action, was interested in the outcome not only by reason of his interest in the subject matter but also because he had given a written guaranty of performance of the November 24 contract; the cross-complaint sought to recover the amount paid under the contract which, according to the testimony of Rogers, had been paid by him.

The evidence is ample that in defending the action Marshall was acting on behalf of Rogers as well as himself; that their interests were not adverse one to another. The situation, therefore, is wholly unlike that in which recovery is had in an action against an agent based upon his conduct in the course of the agency, and in which *res judicata* is sought to be applied later against the principal solely upon the ground that the actionable conduct was that of the principal's agent, and that, therefore, the principal is bound by the judgment against the agent.

> "A person who is not a party to an action but who controls the action is bound by the judgment where he has a proprietary or financial interest in the judgment or in the determination of a question of fact or law with reference to the same subject matter or transaction." (*Stafford v. Russell*, 117 Cal. App. 2d 319, 320.)

In certain circumstances, a non-party principal will be held bound by a judgment against his agent under the doctrine of *res judicata*. (*Shamlian v. Wells*, 197 Cal. 716; *Nisbet v. Rhinehart*, 2 Cal. 2d 477, 484-485.)

A principal under certain circumstances owes a duty to indemnify an agent.

> "Unless otherwise agreed, the principal is subject to a duty to an agent, not barred by the illegality of his conduct, to reimburse him for or to exonerate him from:
>
> ". . .
>
> "(B) payments upon contracts upon which the agent is authorized to make himself liable . . ." (Rest., Agency, §439, p. 1018.)

Nothing in the evidence suggests that Marshall, under this rule, would not be entitled to reimbursement for the amount of the judgment in action #240878 if Marshall had paid it.

> "'[W]here one is bound to protect another from liability he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner.'" (*Sawyer v. Sunset Mutual Life Ins. Co.*, 8 Cal. 2d 492, 500.)

We conclude that the court's application of the doctrine of *res judicata* was proper.

WAS THE LEGALITY AND ENFORCEABILITY OF THE NOVEMBER 24 CONTRACT ADJUDICATED IN ACTION #240878?

Yes.

The doctrine of *res judicata* applies to issues of law as well as of fact. (*Delpit v. U. S. Shipping Board E. F. Corp.*, 115 Cal. App. 85, 86; *Barrett v. Superior Court*, 104 Cal. App. 657.)

In that respect there is no distinction between local law and the laws of a foreign country of which the trial court in action #240878 was entitled to take judicial notice (former Code Civ. Proc. §1875 [4]).

In their brief on appeal, defendants have presented the opinion of a scholar learned in the laws of Mexico that the purchase of all the rights, title and interest, or a part thereof, by an American citizen of a Mexican commercial radio station was not legal under the Mexican law as it was in force in November 1958.

This court takes judicial notice of the fact that Mexican law also forbids the ownership by a non-Mexican national of land within certain distances from the land or maritime borders of that country; also that in practice Mexican law has permitted title to land within the prohibited zone to be held by a Mexican trustee in trust for the benefit of a non-Mexican national for limited periods of time.

We mention the last point not with any pretense of making a redetermination of whether the November 24 contract was legal under Mexican law, but rather to suggest the possibility that the trial court in action #240878 may have taken judicial notice or had other evidence of such permitted practices.

WAS IT PLAINTIFF'S OBLIGATION TO OBTAIN THE TRANSFER OF THE LICENSE FROM FERREIRA TO ANOTHER MEXICAN NATIONAL?

The trial court found that plaintiff did not have that obligation, and that the language of the November 24 contract imported that Marshall had agreed to effect such transfer.

The language of the contract did not in explicit terms declare that either party so agreed. The language is quite consistent with the theory that it was meant to make it clear that Ferreira would not have the right to retain the license in his name against the wishes of Marshall.

We think the evidence, including the finding in action #240878 that no such transfer had been requested up to that time, is clear that Rogers and Marshall had been satisfied to retain Ferreira as the licensee; that they accepted him as their appointee in that regard; that thereby they waived any right to rely upon plaintiff as the person responsible to see that the transfer was made. We so find.

IN PURSUING ACTION #240878 TO JUDGMENT AGAINST MARSHALL ONLY, DID PLAINTIFF ELECT NOT TO LOOK TO ROGERS AS PRINCIPAL?

No. The authorities upon which defendants rely are of two classes: they deal either with a non-disclosed principal (*Craig v. Buckley*, 218 Cal. 78, 81; *McEwen v. Taylor*, 106 Cal. App. 2d 25, 29-30; *Standard Oil Co. of Cal. v. Doneux*, 192 Cal. App. 2d 608, 613; *J. M. Wildman Inc. v. Stults*, 176 Cal. App. 2d 670,

675; *Grosso v. Monfalcone, Inc.*, 13 Cal. App. 2d 405, 409; *Klinger v. Modesto Fruit Co., Inc.*, 107 Cal. App. 97, 100; *Ewing v. Hayward*, 50 Cal. App. 708, 718), or with a contract that on its face showed that the agent was acting as such (*Hannin v. Fisher*, 5 Cal. App. 2d 673, 678-679).

Rogers was a disclosed principal.

> "If, at the time of a transaction conducted by an agent, the other party thereto has notice that the agent is acting for a principal and of the principal's identity, the principal is disclosed." (Rest., Agency 2d, §4 (1), p. 17.)

In the present case, therefore, the following principles govern:

> "A disclosed or partially disclosed principal is subject to liability upon an authorized contract in writing, if not negotiable or sealed, although it purports to be the contract of the agent, unless the principal is excluded as a party by the terms of the instrument or by the agreement of the parties." (Rest., Agency 2d, §149, p. 365.)

(*Bank of America v. Cryer*, 6 Cal. 2d 485, 488.)

> "Recovery of judgment against the agent of a disclosed or partially disclosed principal for failure of performance of a contract to which the agent is a party does not thereby discharge the principal.
>
> ". . .
>
> "Comment:
>
> "c. . . . If the agent becomes a party to the transaction, ordinarily he becomes a surety for the principal. . . . If the agent is separately liable, the other party has two separate causes of action although

based upon the same claim, and only the satisfaction of a judgment against the agent terminates the liability of the principal." (Rest., Agency 2d, §184, pp. 417-418.)

In the present action, further, the claims that an election must be made and had been made, asserted on appeal, were not made in the trial court. Therefore, they have been waived. (*Craig v. Buckley, supra,* 218 Cal. 78, 82.)

WAS THE AWARD OF ATTORNEY'S FEES AS TO THE AMOUNT ARBITRARY AND EXCESSIVE?

The November 24 contract provided:

"Should an attorney be employed to enforce the payment of the sums of money due under terms of this agreement, then Robert S. Marshall agrees to pay Robert J. Zingheim a reasonable attorney's fees."

The transcript of the oral proceedings discloses that in arriving at the amount of attorney's fees, the court considered one-third of the principal amount of a reasonable fee; if that percentage were the sole criterion employed, we should be obliged to say that the method was arbitrary. However, the court made it clear that the award of fees was based upon the amount of work that had been done by plaintiff's counsel.

It is argued by defendants and admitted by plaintiff in the briefs on appeal that the award covered also services rendered in action #240878, in which at-

torney's fees had been refused by the court. Counsel for plaintiff justify the court's action upon the ground that the services performed in action #240878 made it possible to raise the bar of *res judicata* to most of the issues in the present case, thereby shortening the trial. But one of the matters adjudicated in action #240878 was that plaintiff was not entitled to attorney's fees in connection with that action. Counsel for plaintiff mention also that the actions on appeal are "numbers 6 and 7 of a series of seven actions in which counsel or their predecessors (whose fee is to be paid from this 'excessive' award) . . . has variously acted on behalf of respondent."; that it "was apparently the case here" that fees were awarded "in connection with other proceedings . . ."

In fixing attorney's fees in an action on a contract providing for such fees, it is error to make an allowance for attorney's services rendered in an earlier action on the same contract between the same parties in which attorney's fees were refused by the trial court in a judgment that has become final.

Because of that error, that part of the judgment fixing the amount of fees cannot stand unless it should appear as a matter of law that the award is not excessive. The arguments of counsel in which plaintiff's counsel presumably described the services performed were not reported. Of the matters considered by the court, therefore, we have before us only the court files in the two consolidated actions, the transcripts on ap-

peal, and the fact that the allowance improperly included compensation for services rendered in action #240878. The court file in that action shows that the action was tried twice; the first trial was concluded in one day and was followed by a strongly urged and contested motion for new trial; the second trial extended over four days; there were two pre-trial hearings and statements, several amendments to pleadings, and extensive briefs. Apparently the award may have covered services rendered in other actions.

As to one of those other actions, Ferreira's deposition, which was used in the trial of the case at bench, was taken. For services rendered by plaintiff's counsel in the taking of that deposition, an allowance would have been proper.

The present action was tried over a period of three days; there was an additional appearance for the court's oral decision. There was a certain amount of briefing done, the necessary paper work and trial preparation, pre-trial appearance, etc. On the face of it, the fee allowed was clearly excessive for the services performed in connection with the two consolidated actions now on appeal.

Plaintiff is entitled to recover for attorney's fees reasonably incurred in connection with the appeal. (*Automatic Vending Co. v. Wisdom,* 182 Cal. App. 2d 354, 359.) We fix that amount of $1,500.

The judgment is affirmed, except as to the amount of attorney's fees awarded below. As to that element,

the judgment is reversed with directions to the trial court to fix the amount of attorney's fees, based upon services reasonably necessary in connection with the two consolidated actions in the trial court, excluding all services rendered in action #240878 and in any other action not brought to enforce payment under the contract except for possible services in connection with the obtaining of Ferreira's deposition.

In addition to $1,500 attorney's fees on appeal, plaintiff shall recover 75 per cent of his costs on appea' Defendants shall not recover costs on appeal.

Whelan, *J.*

We Concur:

Brown, *P. J.*

Coughlin, *J.*

APPENDIX C.

Portions of Court's Oral Decision.

In the Superior Court of the State of California, in and for the County of San Diego.

Robert J. Zingheim, Plaintiff, vs. Gordon A. Rogers, Defendant.

"All right, this is an oral decision, more or less extemporaneous remarks by the Court. We are principally dealing with two cases which have been, by order of the Court, consolidated for trial: Case No. 262878, Robert J. Zingheim, plaintiff, vs. Robert Marshall and Gordon A. Rogers, defendants. The complaint in this case was filed in this court March 26, 1962. The other case presently before the Court for decision is No. 275082, which was filed in the Municipal Court of the San Diego Judicial District on March 26, 1962 and this case was transferred to this court on May 22, 1963, since the relief sought under the cross-complaint and counter claim brought it within the jurisdiction of this Court.

"Certain stipulations were entered into at the beginning of the trial by reason of which the trial time of these actions was greatly reduced. The findings of fact and conclusions of law, the judgment and the memorandum opinion of Judge Cyrus M. Monroe in Case No. 240878, entitled Robert J. Zingheim v. Robert S. Marshall, were received in evidence pursuant to stipulation. The contract, which is the contract sued upon in case No. 262878, Zingheim vs. Rogers and Marshall, and which is likewise the contract relied upon by plaintiff in case 275082 was before the Court in case No. 240878. The Court, at the request of the parties,

and before the introduction of evidence herein, made certain rulings which limited the issues before this Court, holding them to be *res judicata* by virtue of the rulings of the Court in case No. 240878. Offers of proof upon certain of those issues were made by defendant's counsel, as follows: A. That under the laws of Mexico the contract was illegal and void, in that a person not of Mexican nationality cannot hold directly or indirectly a license to a Mexican radio station and, therefore, the contract considered here would be illegal and void under the laws of Mexico and by our doctrine it would be unenforceable here in the United States.

"B. That there was a material failure of consideration.

"C. That there was misrepresentation by the plaintiff.

"Objections to these offers were made, they were sustained as to Items A and C and no definite ruling appears to have been made by the Court as to the issue of material failure of consideration, so that issue—that that issue may now be considered as properly before the Court.

"It was stipulated that all times material to these actions Marshall was the agent of Rogers.

"In limiting the issues, the Court adopted the proposition cited by plaintiff's counsel that a principal is bound to judgment and findings and conclusions thereof, when at all times during the litigation before the Court, with principal's knowledge, consent and authority, that where the principal is informed of the litigation and takes part in it or controls it.

"Counsel further cites *Freeman on Judgments,* Volume 1, Section 432, as follows: 'Persons though not nominal parties may be active and open participation therein so connect themselves with litigation in which they are interested that the result is *res judicata* for or against them to the same extent as if they were the nominal as well as real parties to the action.'

"Despite the multiplicity of actions which have arisen during the contract of November 24, 1958, the solution to Case No. 262878 lies, for the most part, in a construction of certain of the rights and duties of the parties under those documents which have been introduced in evidence here as Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 1 is an interesting document which consists of three parts: The contract between Robert Zingheim and Robert S. Marshall, the guarantee by Gordon Rogers to Zingheim of the sums to be paid him be Marshall and a covenant by one Fernando Federico Ferreira by which for valuable consideration he agrees to be bound by the contract of November 24, 1958 between Zingheim and Marshall and to transfer the license for Radio Station XEMO to such person of Mexian nationality or such Mexican corporation as Marshal shall designate." (Tr. 266:4-268:25.)

APPENDIX D.

Agreement for Sale of Radio Station and Agency.

THIS AGREEMENT made and executed in duplicate at San Diego, California, this 25th day of November, 1958, between ROBERT J. ZINGHEIM and ROBERT S. MARSHALL, witnesseth:

WHEREAS, ROBERT J. Zingheim heretofore on or about November 1, 1957 purchased Radio Station Agency XEMO in San Diego, California; and

WHEREAS, Robert J. Zingheim heretofore on or about June 28, 1958 purchased all of the right, title and interest of Bugenio Carrasco Bravo in and to Radio Station XEMO in Tijuana, Baja California, Republic of Mexico; and

WHEREAS, Robert J. Zingheim heretofore on or about July 21, 1958, purchased all of the right, title and interest of Fernando Federico Ferreira in and to Radio Station XEMO in Tijuana, Baja California, Republic of Mexico; and

WHEREAS, Robert S. Marshall desires to purchase all of Robert J. Zingheim's right, title and interest in and to Radio Station Agency XEMO and Radio Station XEMO;

NOW THEREFORE, in consideration of the sum of Forty Thousand Dollars ($40,000.00), lawful money of United States of America, to be paid to Robert J. Zingheim by Robert S. Marshall in the manner and at the times as set forth herein, Robert J. Zingheim agrees to and by these presents does grant, bargain, sell, transfer, and assign, as of December 1, 1958, all of his right, title and interest in and to Radio Station Agency XEMO in San Diego, California, and Radio Station

XEMO in Tijuana, Baja California, Republic of Mexico, together with all other assets of any kind or nature whatsoever belonging to said agency and said station.

This contract is made upon the following terms, covenants and/or conditions which the parties agree to comply with:

1. Radio Station XEMO in Tijuana, Baja California, Republic of Mexico, is presently in the name of Fernando Federico Ferreira, and shall be transferred to such person of Mexican nationality or such Mexican Corporation as Robert S. Marshall shall designate.

2. The date of this agreement taking effect shall be December 1, 1958. As of this date Robert S. Marshall shall be entitled to all accounts receivable of said agency and of said station, subject to such liabilities as exist at such time against said agency and said station, except those liabilities set out in Paragraph 3, infra, which Robert S. Marshall will assume.

3. Robrt S. Marshall hereby agrees to pay the note owed by Robert J. Zingheim to Arthur Burgess in the face amount of Ten Thousand Dollars ($10,000.00); and to pay to Frank C. Owen the sum of Two Thousand Five Hundred Dollars ($2,500.00), in satisfaction of his claim for legal services rendered to Robert J. Zingheim and personal property advanced to Robert J. Zingheim, at the rate of Five Hundred Dollars ($500.00) each successive month commencing with January 1, 1959; and to further pay to Frank C. Owen the sum of Three Thousand Five Hundred Dollars ($3,500.00), which sum was heretofore advanced to Robert J. Zingheim and Fernando Federico Ferreira and Eugenio Carrasco Bravo by Frank C. Owen, on or before December 15, 1958.

4. Robert S. Marshall agrees to pay to Robert J. Zingheim the sum of Forty Thousand Dollars ($40,000.00) in installments payable on the tenth day of each and every successive month until paid in full, commencing on the 10th day of January, 1959, said installments being computed as follows:

An installment of Three Hundred Dollars ($300.00) per any month that there either are no net billings or that the net billings do no exceed the sum of Eight Thousand Dollars ($8,000.00); or
An installment of Six Hundred Dollars ($600.00) per any month that the net billings are between the sum of Eight Thousand Dollars ($8,000.00) and the sum of Twelve Thousand Dollars ($12,000.00); or
An installment of One Thousand Dollars ($1,000.00) per any month that the net billings exceed the sum of Twelve Thousand Dollars ($12,000.00).

In computing these installments, the term net billings shall mean the gross billings of Radio Station Agency XEMO and Radio Station XEMO less any agency and/or sales commissions. These installments shall be due and payable on the 10th day of the month following the month for which they are computed as set out herein. Should default be made in the payment of any installment when due, or should Robert S. Marshall make a general assignment for the benefit of his creditors, or should any action be taken against Robert S. Marshall under any insolvency or bankruptcy act, then the whole sum remaining unpaid shall become immediately due and payable at the option of Robert J. Zingheim. Should an attorney be employed to enforce the payment of the sums of money due under terms

of this agreement, then Robert S. Marshall further agrees to pay to Robert J. Zingheim a reasonable attorney's fees. This sum of money is payable in lawful money of the United States of America.

5. Both parties hereto agree to execute any and all papers, documents, and/or instruments necessary or convenient for the execution of the objectives of this contract.

6. The parties agree that the Superior Court of the State of California shall be the sole and exclusive forum for the trial of any issues or matters or causes of action which may arise to any party hereto because of this contract. However, if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect, but the balance of this contract is to remain in full force and effect.

Robert J. Zingheim
Robert S. Marshall

For value received, I hereby guarantee to Robert J. Zingheim the payment of the sum of Forty Thousand Dollars ($40,000.00) by Robert S. Marshall at the time and in the manner as set forth in the above agreement.

November 24, 1958.

Gordon A. Rogers

Subscribed and sworn to before me this 24th day of November, 1958.

C. A. Thompson
In and for the County of Los Angeles, State of California.
My Commission Expires Apr. 22, 1959.

Número 98698 Derechos 4.00

SERVICIO CONSULAR MEXICANO

EL suscrito EDMUNDO GONZALEZ

Cónsul General de México en Los Angeles

California, certifica que la firma que antecede

es de HAROLD J. OSTLY, Secretario de la Corte Superior del Estado de California por el Condado de Los Angeles.

y la misma que acostumbra usar en todos los documentos que autoriza; por la cual se le debe dar fe y crédito.

10 marzo de 1961.

FOR VALUE RECEIVED, I hereby agree to be bound by the terms of the contract dated November 24, 1958, between Robert J. Zingheim and Robert S. Marshall, and further agree to transfer the license for Radio Station XEMO in Tijuana, Baja California, Republic of Mexico to such person of Mexican nationality or such Mexican Corporation as Robert S. Marshall shall designate.

Fernando Federico Ferreira

Subscribed and sworn before me this 24th day of November, 1958.

C. A. Thompson

In and for the County of Los Angeles, State of California.

My Commission Expires April 22, 1959.

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

I, HAROLD J. OSTLY, County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles, which Court is a Court of Record, having by law a seal do hereby certify that C. A. Thompson

whose name is subscribed to the attached acknowledgment, proof or affidavit, was at the time of taking said acknowledgment, proof or affidavit, a Notary Public IN AND FOR LOS ANGELES COUNTY, duly commissioned and sworn, and residing and/or with principal place of business or employment in said County, and was, as such, an officer of said State, duly authorized by the laws thereof to take and certify the same, as well as to take and certify the proof and acknowledgment of deeds and other instruments of writing to be recorded in said State, to take depositions and/or affidavits, and to administer oaths or affirmations, in any County in this State, and that full faith and credit are and ought to be given to his official acts; that the certificate of such officer is required to be under seal; that the impression of his official seal is not required by law to be on file in the office of the County Clerk; I further certify that I am well acquainted with his handwriting and verily believe that the signature to the attached document is his genuine signature, and further that the annexed instrument is executed and/or acknowledged according to the laws of the State of California.

In Witness Whereof, I have hereunto set my hand and annexed the seal of the Superior Court of the State of California, in and for the County of Los Angeles.

this 6th day of March 1961

HAROLD J. OSTLY

Numero 98699 Derechos 4.00

SERVICIO CONSULAR MEXICANO

EL suscrito EDMUNDO GONZALEZ

Cónsul General de México en Los Angeles California, certifica que la firma que antecede es de HAROLD J. OSTLY, Secretario de la Corte Superior del Estado de California por el Condado de Los Angeles, y la misma que acostumbra usar en todos los documentos que autoriza; por lo cual se le debe dar fe y crédito.

Los Angeles, Calif., a 10 de Marzo de 195 1961.

NOTA: ESTA OFICINA NO ASUME RESPONSABILIDAD ALGUNA POR EL CONTENIDO DEL DOCUMENTO ANEXO

SUPREME COURT, U. S.

No. 413

FILED

AUG 23 1967

JOHN F. DAVIS, CLERK

In The Supreme Court of The United States

OCTOBER TERM, 1967

GORDON A. ROGERS,

Petitioner,

vs.

ROBERT J. ZINGHEIM,

Respondent.

BRIEF IN OPPOSITION TO
GRANTING OF PETITION FOR CERTIORARI

KIMBALL, JONES, KELLY
& McCARTY
By: WILLIAM M. McCARTY
1700 Electronics Capital Bldg.
San Diego, California 92101

Counsel for respondent.

SUBJECT INDEX

	Page
JURISDICTION	1
STATEMENT	2
ARGUMENT	4
CONCLUSION	12

TABLE OF AUTHORITIES CITED

Page

CASES

Baker v. Cummings, 21 SC 578 7

Berea College, 211 U.S. 45 12

Coughlan v. South Carolina R. Co.
12 SC 150 9

Ferguson, 365 U.S. 570 11

Fox Film, 296 U.S. 207 12

Lamkin, In re, 355 U.S. 52 11

Louisville etc. R. Co. v. Schmidt,
20 S. Ct. 620 5

Lyle v. McKendrick, 204 Fed. Rep. 2d 609 . 6

Mutual Life Ins. Co. v. Phinney,
20 SC 906 9

Siman v. Craft, 21 S. Ct. 836 6

Stembridge, 343 U.S. 541 11

Swain v. Seamens, 76 U.S. Reports 254. . . . 6

RULES

Supreme Court Rules, Rule 23(1) (F) 10

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Respondent.

BRIEF IN OPPOSITION TO GRANTING OF PETITION FOR CERTIORARI

JURISDICTION

It is respectfully submitted that the petition of GORDON A. ROGERS for a Writ of Certiorari to review the judgment of the District Court of Appeal, Fourth Appellate District, State of California, Division I, entered on March 22, 1967 should be denied.

The opinion of that court did not touch upon nor decide any question arising under the Federal Constitution

in that there has been no violation of due process at any stage of the proceedings and the issue of comity is of no merit and improperly raised.

STATEMENT

On November 24, 1958, respondent by written agreement, sold radio station XEMO located in Tijuana, Mexico, together with its physical facilities and a radio time sales agency located in San Diego, California, to petitioner Rogers. Rogers' agent, Robert S. Marshall, actually executed the contract, but it was understood by all parties that Rogers, who was present at the execution, was the disclosed principal and real party in interest. At the same time a Mexican citizen, one Ferreira, in whose name the license was held, executed a separate document by which he agreed to transfer the license to Marshall's nominee upon demand.

Subsequently, in 1959, the physical assets, agency and accounts receivable of Radio Station XEMO were transferred to a California corporation, Radio 860, Inc. In 1960 the building and physical facilities of the station were destroyed by fire. In 1961 the station resumed operation at a new location. Because of Rogers' failure to make payments in accordance with the original contract, a series of actions were filed and the instant consolidated appeals are taken from two of these cases, No. 275082, Zingheim v. Rogers, and No. 262878, Zingheim v. Marshall and Rogers, which were consolidated for trial.

Ferreira remained as the only licensee of XEMO

until his death on March 23, 1964, and no demand was ever made upon him for transfer of the license.

Case No. 275082 was filed against appellant Rogers in Municipal Court, to recover the amount of a judgment that had been rendered in an earlier action No. 240878 against Marshall, based upon Rogers' position as a disclosed principal and surety for Marshall. In that action the court found that Rogers was bound by the findings of fact, conclusions of lawand judgment in action No. 240878. Since, however, that judgment was for the amount of $3600 only, the amount of payments due at the inception of action No. 240878, a subsequent action No. 262878 for the entire contract balance was instituted on March 26, 1962. A judgment was rendered in that action in the amount of $29,689.04, for $3600, and for the unpaid balance of the purchase price against both Rogers and Marshall and attorneys' fees were awarded in the amount of $9896.

Judgments in favor of plaintiff and respondent herein were appealed to the Court of Appeal of the State of California, Fourth Appellate District, Division One, on March 27, 1967. (Fourth Civil Nos. 8151 and 8152). The Appellate court affirmed the judgment of the trial court except as to the amount of attorneys' fees awarded below. The amount of attorneys' fees were subsequently stipulated to between the parties at $5000.

A petition for hearing, addressed to the Supreme Court of the State of California was denied without hearing on April 24, 1967.

Petitioner mistakenly asserts that illegality of the

contract under Mexican law was rejected by the court in action No. 240878 "without comment." Judge Monroe, in that action, stated:

> "The allegation is based upon the theory that the agreement is invalid and unenforceable under the laws of Mexico. This contention appears to be without merit. It is true that the laws provide that the holder of the license to operate the radio station in Mexico must be a Mexican corporation or a Mexican citizen. This is customarily met by providing for appointees designated to hold such license or to hold title to the property. This was thoroughly understood by the parties at the time and reference thereto appears in the contract itself."

This decision was upheld in all subsequent actions.

ARGUMENT

The thrust of petitioner's argument is that under the conflict of laws doctrine Mexican law should govern as to the legality of the contract; that because of comity between nations the courts should recognize that illegality, and that the application of the principle of res judicata as to the issue of illegality resulted in a denial of due process to him.

In action No. 275082 it was stipulated between the parties that in earlier action No. 240878, against Marshall alone, petitioner Rogers supplied counsel, had a

proprietary interest in the outcome, and was the disclosed principal for his agent, Marshall, at the time the contract was executed on November 24, 1958. It is a matter of record that Rogers appeared as a witness in Action no. 240878, and that he guaranteed payments under the contract.

In light of these facts the court, in action No. 275082, held that findings of fact, conclusions of law, and the judgment in action No. 240878 were res judicata as to petitioner Rogers. This decision, affirmed on appeal, follows the logical rationale that a party with a proprietary interest in an action, who is duly notified and appears, who supplies counsel and controls that action, should be estopped to deny its res judicata effect as to himself on the sole basis of his voluntary choice not to intervene as a party. Under these circumstances the application of the doctrine of res judicata is not, and cannot be, violative of due process.

> "One who has voluntarily appeared in a case and actively conducted the defense cannot be held to have been denied by the courts of the state of the right to make a defense which was never presented."
>
> Louisville etc. R. Co. v. Schmidt, 20 S. Ct. 620

> "The essential element of due process are notice and opportunity to defend. In determining whether such rights have been denied, the courts are governed by the substance of things and not by mere form."

Siman v. Craft, 21 S. Ct. 836

For this reason the doctrine of res judicata was properly applied as to petitioner. However, petitioner is estopped, by his own actions, to raise the defense.

Petitioner owned and operated the station, retaining profits and title, for two years before his failure to make the payments provided in the contract resulted in the series of court actions. Four years after the inception of the original action, No. 240878, he still claimed ownership. He did not, and at this date still has not, offered to return to respondent, the station, or any portion of it, or the profits which he still retains. Despite that he seeks rescission of the contract.

> "One may not retain the benefits of a contract, and at the same time reject its burdens."
>
> Lyle v. McKendrick,
> 204 Fed. Rep. 2d 609, 612

> "Where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or acts of encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adversary claim."
>
> Swain v. Seamens,
> 76 U.S. Reports 254, 274

"A waiver of all right to question the validity of a contract may be founded upon the claiming and acceptance of a benefit under it after full knowledge of all the facts."

Baker v. Cummings, 21 SC 578 at 583

It is clear that application of the doctrine of res judicata as to the petitioner did not result in a denial of due process.

Petitioner mistakenly asserts that both the California Court of Appeal and the trial court took judicial notice that the contract was contrary to Mexican law. The opinion of the California Court of Appeal states:

"In their brief on appeal, defendants have presented the opinion of a scholar learned in the laws of Mexico that the purchase of all the rights, title and interest, or a part thereof, by an American citizen of a Mexican commercial radio station was not legal under the Mexican law as it was in force in November 1958.

"This court takes judicial notice of the fact that Mexican law also forbids the ownership by a non-Mexican national of land within certain distances from the land or maritime borders of that country; also that in practice Mexican law has permitted title to land within the prohibited zone to be held by a Mexican trustee in trust for the benefit of a non-Mexican national for limited

periods of time.

"We mention the last point not with any pretense of making a redetermination of whether the November 24, contract was legal under Mexican law, but rather to suggest the possibility that the trial court in action #240878 may have taken judicial notice or had other evidence of such permitted practices."

The essence of the contract was the transfer of the license to a Mexican nominee to be named by Marshall. It has never been contended by respondent that transfer to an American licensee would not have been violative of Mexican licensing laws. Petitioner made a thorough study of this problem, consulting his own "expert", one Ashley Robeson, prior to executing the contract. If it was his subjective intent to violate the Mexican licensing regulation by appointing an American nominee, rather than a Mexican as the contract anticipated, he did not reveal this for some two and one-half years, and then only as a defense to enforcement of the contract.

The contract itself provides that it is to be governed by California law and if any portion is violative of Mexican law that portion only shall be void and the rest of the contract remain in full force and effect.

"6. The parties agree that the Superior Court of the State of California shall be the sole and exclusive forum for the trial of any issues or matters or causes of action which may arise to any party

> hereto because of this contract. However, if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect, but the balance of this contract is to remain in full force and effect."

For this reason the intent of the contracting parties and their principals should prevail and the judgments of the California courts upheld. The contract was not illegal at inception and only the illegal acts of petitioner himself could have violated the Mexican law.

> "The nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it was made, unless the parties at the time of making it, have some other law in view."
>
> Coughlan v. South Carolina R. Co.
> 12 SC 150, 152

> "When two parties enter into a contract, and make it determinable by the law of another state, it is conclusively presumed that each of them knows the law in respect to which they make the contract."
>
> Mutual Life Ins. Co. v. Phinney
> 20 SC 906, 911

The doctrine of conflicts of law is not properly raised since the intent of the parties, as to governing

law, controls. Furthermore, this issue was raised for the first time in petitioner's Petition for a Writ of Certiorari addressed to this Court and is violative of Supreme Court Rule 23 (1) (F) in that it does not state this.

> "Rule 23 (1) (F). If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge any exceptions, by assignment of error); and the way in which they were passed upon by the court; and with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (e. g., ruling or exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.
>
> "Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented. "

"Rule 23 (i): There shall be appended to the petition a copy of any opinions delivered upon the rendering of the judgment or decree sought to be reviewed, including all opinions of courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, opinions in companion cases. If whatever is required by this paragraph to be appended to the petition is voluminous, it may, if more convenient, be separately presented."

"The litigant must follow the state procedures in raising the federal question."

In re Lamkin, 355 U.S. 52

Ferguson 365 U.S. 570, 572

The closely related issue of comity between the nations was raised for the first time in the Petition for Hearing addressed to the Supreme Court of the State of California and should be denied for that reason.

"Where the Federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediated court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by the Supreme Court."

Stembridge 343 U.S. 541, 547

"The Supreme Court will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved and perhaps wrongly decided."

Berea College 211 U.S. 45, 53

Fox Film 296 U.S. 207

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

KIMBALL, JONES, KELLY & McCARTY

Counsel for Respondent.